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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

145

THE HONORABLE MICHAEL L. IGOE, UNITED STATES DISTRICT JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

Your petitioner, Michael L. Igoe, United States District Judge of the United States District Court for the Northern District of Illinois, respectfully prays that a writ of certiorari be issued to review the judgment and decision of the United States Court of Appeals for the Seventh Circuit on the original petition for a writ of Mandamus in the

case of *United States of America, Petitioner* v. *The Honorable Michael L. Igoe, United States District Judge of the United States Court for the Northern District of Illinois, Respondent,* No. 14412.

JUDGMENT AND OPINION OF THE COURT BELOW

This is a prayer to review the issuance of a Writ of Mandamus directing this petitioner to reinstate a cause, theretofore dismissed in the district court for want of prosecution, and to set it for trial.

The Order of the United States District Court for the Northern District of Illinois, Eastern Division, this Petitioner presiding, was entered on September 12, 1963, in a case wherein the there defendant, Orlando P. Colamatteo, was charged in one count will a willful and knowing attempt to evade and defeat income taxes for the calendar year 1954, in violation of Section 7201 of the Internal Revenue Code of 1954.

The basis of this case stems from a refusal of the government to consent to the waiver of a jury by the defendant, and the Court's overruling the government's "objections" to proceeding without a jury. When the case was ordered to trial without a jury, the prosecution refused to put on any evidence, and the case was dismissed for want of prosecution. The United States of America sought Mandamus in the Court of Appeals for the Seventh Circuit to compel the trial judge, this petitioner, to reinstate the cause and to set it for trial, which prayer for relief was granted. The opinion of the United States Court of Appeals for the Seventh Circuit, directing the issuance of said writ, was filed on the 7th day of May, 1964. That opinion is not yet reported, but it is set forth in the appendix hereto and in the certified copy of the record.

JURISDICTION

The Order of the United States Court of Appeals for the Seventh Circuit granting the issuance of a writ of mandamus directed to this Petitioner, the Honorable Michael L. Igoe, United States District Judge for the Northern District of Illinois, Eastern Division, was filed on May 7, 1964. (That Order appears in the appendix hereto.) This Petition is filed with 30 days of the issuance of that order. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Does the Defendant have the constitutional right to waive a jury trial?

2. Does Rule 23 (a) of the Federal Rules of Criminal Procedure conditioning Defendant's waiver of jury trial upon consent of the Government violate due process?

3. Has not Rule 23 (a) of the Federal Rules of Criminal Procedure been so construed as to raise a serious constitutional issue in violation of law?

4. Can a Writ of Mandamus issue without hearing on the good faith of the Petitioner, when good faith has been contested?

5. When, in a trial without a jury, does jeopardy attach?

CONSTITUTIONAL PROVISIONS and RULE INVOLVED.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence." *The Constitution of the United States of America, Sixth Amendment.*

"*Trial by Jury.* Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing of the government." *Rule 23 (a) Federal Rules of Criminal Procedure.*

STATEMENT OF THE CASE.

A one count indictment was returned against Orlando P. Colamatteo on April 12, 1961, charging him with a violation of 26 U.S.C. 7201 (App. 95). The indictment once dismissed, was determined to be sufficient by the United States Court of Appeals for the Seventh Circuit. *United States* v. *Colamatteo*, 7 Cir., 312 F.2d 157.

Neither the details of the indictment nor the facts upon which it arose are necessary to a consideration of this Petition, and, therefore, will not be detailed. This Petition is concerned only with whether Rule 23 (a) of the Federal Rules of Criminal Procedure has been properly applied, and whether this Defendant has been put in jeopardy so that the direction of a new trial by the Court of Appeals is proper or improper.

On June 17, 1963, the trial Court inquired as to whether this case was to be a jury or a Court trial. The Assistant United States Attorney answered that "It appears to be a jury trial". The Court then indicated that the case would be continued until September. Upon the court's remarking that the government will not waive a jury and will not consent to the defendant's waiving the jury, defense counsel stated that he had a point to make regarding a Constitutional question as to "their rights". The Court then set the case over until September 10, "at which time you can make your remarks" (App. 97-99).

On September 10, 1963, the cause was held on the trial call subject to trial on September 11, 1963. On September 11, 1963, the cause was continued to September 12, 1963, for trial. (App. 88).

On September 12, 1963, the cause was called to trial. The defendant waived his right to trial by jury, stating as a reason therefor the flood of anti-Italian publicity and his belief on account of such publicity that an impartial jury could not be obtained, and signed a jury waiver. The government refused to sign a consent to the jury waiver, interposing no reason for refusal. The government's bare objection to the filing of a waiver of jury trial on the part of the defendant was overruled and the government ordered to proceed by putting on its witnesses. The government advised the court that its witnesses were not immediately available but they would be there at 2:00 P.M., whereupon further hearing in the matter was continued until 2:00 the same September 12, 1963. At 2:00 the Assistant United States Attorney moved the Court to reconsider its prior ruling. After argument, the motion to reconsider was denied. Government counsel thereupon requested a continuance, of at least a week. The Court stated, "Oh, no. This case has been up here for a long long, time. You have announced you are ready and you are demanding a trial. We are going ahead with the trial, call your witnesses." Government counsel then asked the court to give them at least overnight, which was denied. Government counsel then informed the court that, "Based on the fact that the court has overruled the Government's Motion to refuse to sign the jury waiver, we will not move forward." The court then stated, "you say you will not move forward?" . . . Then the case will be dismissed for want of prosecution . . . That will be the order." (App. 113-114)

On the above facts the Court of Appeals for the Seventh Circuit made a finding that:

> "It is clear that the cause was dismissed because the Government withheld its consent to waiver of trial by jury." (App. A. 2)

And again in the concurring opinion:

> "The record before us shows clearly that the real and only ground for a dismissal of the case for want of prosecution was the Government's refusal to sign the jury waiver." (App. A. 6)

As a matter of fact, it appears that the concurring opinion served no purpose other than to reiterate what we consider a wrongful erroneous interpretation of the plain facts. We think that the record clearly shows that this case was dismissed for want of prosecution because the government refused to put on its witnesses, refused to proceed.

In any event, the Government on September 23, 1963, filed its Notice of Appeal from the Order dismissing the cause for want of prosecution. (App. 91) The Appeal was dismissed in Cause 14377 (App. A. 5).

On November 29, 1963, 78 days after the entry of the Order of September 12, 1963, the Government filed an original Petition for a Writ of Mandamus against your Petitioner here, Michael L. Igoe, United States District Judge of the United States District Court for the Northern District of Illinois, alleging in essence the facts hereinabove set forth and praying that the Writ of Mandamus issue commanding and directing this Petitioner to vacate his Order of September 12, 1963, and directing him to state *(sic)* the cause for trial upon the indictment. This Petitioner filed an answer to the Petition for the Writ of Mandamus alleging among other things:

> "The Petition fails to state a claim upon which relief can be granted in that the relief prayed by the petitioner, if granted, would be violative of the Fifth Amendment to the Constitution of the United States forbidding that 'any person be subject for the same offense to be put twice in jeopardy of life or limb: * * * '

"Should Rule 23(a) of the Federal Rules of Criminal Procedure be interpreted as vesting a right of trial by jury in the Government, it is violative of Article 1, Section 7, Clause 2 of the Constitution of the United States.

"The Petition, seeking the extraordinary and emergent remedy of Mandamus, is barred by laches, the act of this Respondent here sought to be changed having occurred on September 12, 1963. and this Petition filed on November 29, 1963, seventy-eight days subsequent.

"The sworn Petition for Issuance of the Writ of Mandamus should be stricken for want of good faith, as more clearly appears hereinafter.

* * *

"The Respondent admits that on September 12, 1963, the case was called on for trial and the defendant, Orlando P. Colamatteo, filed a waiver of his right to trial by jury in open court. The respondent further shows that the stated basis for the defendant's election to waive a jury trial was that there had been repeated publicity relating to factions of Italian descent and that defendant, with a name of obvious Italian origin, had a belief and conviction that he could not obtain a jury who was uninformed of such persistent publicity and that, therefore, a fair equitable and impartial jury could not be obtained. (App. 105)

"The Respondent admits that the Government refused to consent to the waiver of trial by jury, and, further, shows that the Government's refusal to consent was not based on any ground stated to the court, or to be inferred from the record. (App. 103-106).

* * *

"The respondent admits that the Government represented that witnesses were available in the following manner:

> 'We have the witnesses in the building, and are ready to go forward in that respect.' (App. 114)

"The respondent admits that subpoenas had previously issued and that the Court by order entered in the absence of said witnesses made said subpoenas returnable on September 12, 1963.

"On information and belief, the respondent denies that the Government had 'the witnesses in the building.' (App. 111).

"On information and belief, the respondent alleges that many of the witnesses were not apprised by the Government that the cause was expected to proceed to trial on September 12. 1963. And, in support of said denial, appends hereto and incorporates herein, by reference, Exhibits A through D."[1] *Answer to Petition For Writ of Mandamus,* Pages 1, 2, 3, 7, and 8.

On the Petition for the Writ and the Answer filed thereto, the Court of Appeals for the Seventh Circuit found (excepting facts statement and case interpretation) as follows:

"The Rules, promulgated by the Supreme Court of the United States, have the force and effect of law and are binding on District Judges conducting criminal trials in the United States District Courts. *U.S.* v. *Hvass,* 1958, 355 U.S. 570, 575. This Court has authority to issue its writ to ensure the proper application of those rules and in aid of its appellate jurisdiction. *Howes Leather Co.* v. *LaBuy,* 7 Cir., 1955, 226 F. 2d 703, 708, afd. sub nom. *LaBuy* v. *Howes Leather Co.,* 352 U.S. 249 (1957); *U.S.* v. *Smith,* 331 U.S. 469, 477 (1947); *Ex Parte United States,* 287 U.S. 241, 246 (1932); *Los Angeles Brush Corp.* v. *James,* 272 U.S. 701, 707 (1927).

"Rule 23 is clear and unambiguous. For defendant effectively to waive his Constitutional right to trial by jury, he must secure both the approval of the Court

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[1] Four Affidavits were filed by subpoenaed witnesses to the effect that they had not been so informed.

and the consent of the government. *Patton* v. *U.S.*, 281 U.S. 276, 312 (1930); *Dixon* v. *U.S.*, D.C. Cir., 1961, 292 F. 2d 768, 769.

* * *

"It is also contended by respondent that grant of the government's prayer will expose the defendant, Orlando P. Colamatteo, to double jeopardy. We disagree. No jury had been empaneled, no evidence had been heard, the trial had not begun when the cause was dismissed. *Hunter* v. *Wade*, 10 Cir., 1948, 169 F. 2d 973, 975, aff'd. 336 U.S. 684." (App. A. 3, 4)

REASONS FOR GRANTING THE WRIT

This Court should exercise its jurisdiction in this case for the following reasons:

I.

The first two questions presented to this Court

(1) Does the defendant have the constitutional right to waive a jury trial?

(2) Does Rule 23(a) of the Federal Rules of Criminal Procedure conditioning defendant's waiver of jury trial upon consent of the government violate due process?

are already before this Court on a grant of Certiorari in *Singer* v. *United States*, No. 898, which grant of Certiorari issued on April 20, 1964. The Government, in the Court below, relied heavily on the *Singer* case, in which this Court granted Certiorari (reported at 326 F. 2d 132). This Court obviously found compelling reasons for granting the writ inherent in these questions presented. We are equally sure that able counsel in the *Singer* case has clearly brought

such reasons to the attention of this Court. This cause presents the "other side of the coin" to the *Singer* case. Here the defendant waived jury trial, and the Court approved of the waiver. The Government, for no reason apparent on the record, elected to withhold its consent to the waiver. It objected to proceeding without a jury, and the Trial Court overruled its objection. We submit that consideration of this aspect of the cause together with the situation presented by the *Singer* case will allow a more comprehensive survey of the subject.

Though we are confident there has been complete exploration, probably beyond our consideration, of the importance of the questions, we shall state hereafter those that we consider important.

II.

The Court of Appeals for the Seventh Circuit decided "For defendant effectively to waive his constitutional right to trial by jury, he must secure both the approval of the Court and the consent of the Government." (App. A. 3)

In other words, the Seventh Circuit ruled that the words "shall be tried by a jury" appearing in Rule 23 is a mandate in the absence of consent by the Government. We submit that such an interpretation conflicts with the very decision of this Court upon which the wording of Rule 23 relies. In *Patton* v. *United States*, 281 U.S. 276, this Court said at Page 298 that a right to jury trial was conferred upon the accused which he could forego at his election. "To deny his power to do so is to convert a privilege into an imperative requirement." In *Adams* v. *United States ex rel McCann*, 317 U.S. 269, this Court again spoke of the intention of the Constitution to confer this right upon the accused foregoable at *his* election. (317 U.S. at 278, fn. 3).

Denial of his power is exactly what occurs under the interpretation given Rule 23 by the Government and by the Seventh Circuit. It converts a defendant's right and privilege to a jury trial under the Sixth Amendment into an imperative requirement, if the Government so elects. The Defendant's election to forego trial by jury is written out of the Constitution.

III.

We further submit that the interpretation of the Sixth Amendment, as implemented by Rule 23, to foreclose a defendant from waiving a jury trial without the consent of the government departs from the accepted and usual course of judicial proceedings. No other right under the Sixth Amendment is so interpreted. An accused person may without the consent of the Government, waive his right to appear and defend by counsel, he may waive his right to have a copy of the accusation against him, he may waive his right to meet the prosecution's witnesses face to face, he may waive his right to have process to compel the attendance of witnesses in his behalf, he may waive his right to a speedy trial. All these rights are enumerated in the same Sixth Amendment, as is the right to a trial by jury. If an accused person may waive, despite objection by the government, the other constitutional safeguards of the Bill of Rights providing for his protection, there is no reason for placing his waiver of the right to a jury trial, in case of like objection, upon the different basis. To require the prosecution's consent to make a waiver effective is inconsistent with the defendant's acknowledged power, enables the prosecution to nullify his act and reduces his power to waive a jury trial to a shadow. All of these considerations compeled the Supreme Court of the State of Illinois in *People* v. *Speigel*, 5 Ill. 2d 211, to overrule its earlier decisions that a defendant has a right to a jury trial but

no right to a trial without a jury. As the Supreme Court of Illinois said in that case "Before there can be the power to waive a jury trial, the right to such a trial must exist. . . . The power to waive follows the existence of the right, . . ." (5 Ill. 2d at 218). We submit the decision of the 7th Circuit not only has departed from the accepted and usual course of judicial proceeding, but has departed from the accepted and usual and necessary personal concept of the rights given by the Bill of Rights, and the personal determination as to whether they will be availed of.

IV.

We further submit that the decision of the 7th Circuit in this cause raises an important question of Federal Law which has not been, but should be, settled by this Court. The question is whether the waiver provisions of Rule 23 are purely procedural, as it has been said they are to be regarded[2], or does it confer upon the government an unrestricted right to trial by jury in all criminal cases. This decision has raised the important question as to whether this procedural rule confers upon the Government a right which it does not enjoy at common law, under the Statutes, or under the Constitution of the United States. It raises the important question of whether the conferring of such a right upon the Government is not a matter confided to the legislature by the Constitution of the United States (Article 1, Section 1, Constitution of the United States, and whether the conferring of the substantive right is valid without respect to the requirements of Article 1, Section 7, Clause 2, that every bill shall be presented to the President of the United States so that he may exercise his power of veto, if he is so inclined.

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[2] Federal Rules of Criminal Procedure, notes of Advisory Committee, 1963 publication.

V.

There is still another consideration, purely practical in application. It must certainly be generally recognized that to defend against a criminal charge, with a jury sitting, increases the expense to the defendant two, or even three, times. The trial is longer, the costs of defense counsel is necessarily greater, the cost of transcript, all are enhanced. No provision has been made to reimburse the defendant for these additional costs generated by the Government, should it withhold its consent and should its consent be necessary to effect a waiver of jury trial, as the Seventh Circuit has held. We submit this, too, is an important question of federal law which has not been, but should be, settled by this Court. It should be determined whether a defendant can be burdened with these expenses due to the action of the Government, or does the imposing of unnecessary expense constitute a deprivation of property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

VI.

We also submit that this Court should grant Certiorari because there has been a very serious departure from the accepted and usual course of judicial proceedings in this cause. The Petition for the Writ of Mandamus was filed. Essential to granting the relief sought thereby was a showing of good faith. The Answer to the Petition for the Writ of Mandamus put good faith in issue. The Government in its petition stated:

> "9 . . . The Government represented that witnesses were available and it was prepared to proceed to trial; in fact, some 31 subpoenas had previously been served and were returnable, by order of Court, and that 30 days." (Petition For Writ of Mandamus, p. 3)

This Petitioner, by way of answering, stated:

> "9 . . . The respondent admits that the Government

represented that witnesses were available in the following manner:

> 'We have the witnesses in the building, and are ready to go forward in that respect.' (App. 114)
>
> "The respondent admits the subpoenas had previously issued and that the Court by order entered in the absence of said witnesses made said subpoenas returnable on September 12, 1963.
>
> "On information and belief, the respondent denies the Government had 'the witnesses in the building.' (App. 114).
>
> "On information and belief, the respondent alleges that many of the witnesses were not apprised by the government that the cause was expected to proceed to trial on September 12, 1963. And, in support of said denial, appends thereto and incorporates therein, by reference, Exhibits A through D." (Answer To Petition for Writ of Mandamus, p. 8)

Exhibits A through D were sworn statements of subpoenaed witnesses that they had not been advised, had not been contacted. It is our submission that failure to hold a hearing on the issue of good faith not only departed from the accepted and usual course of judicial proceedings, but violated basic due process, and an exercise of this Court's power of supervision is required.

VII.

This case also, presents an important and basic question of federal law which has not been, but should be settled by this Court. It is our submission that the question has never been clearly settled by any federal court. That question is when, in a trial without a jury, does jeopardy attach? When does such a trial *begin?* The Seventh Circuit held:

> "It is also contended by the respondent that grant of the Government's prayer will expose the defendant, Orlando P. Colamatteo, to double jeopardy. We disa-

> gree. No jury had been enpaneled, no evidence had been heard, trial had not begun when the case was dismissed." (App. A. 4)

In its decision the Seventh Circuit relied upon *Hunter* v. *Wade,* 10th Cir. 169 F. 2d 973 (affirmed by this Court 336 U.S. 684). We agree that the statement in *Hunter* v. *Wade,* is the clearest measure of the definition of jeopardy in non-jury cases that our research has developed, and that statement is none too clear. The statement of the Tenth Circuit in that case is:

> "where the cases tried to the Court without the intervention of the jury, jeopardy attaches when the Court begins the hearing of evidence." (169 F. 2d at 975)

Here the defendant had presented himself, ready and committed to a proceeding that could terminate in the loss of his liberty, and there was no power in him to stop the proceeding prior to determination. The Court had twice called upon the Government to put on its witnesses. The Government twice refused to do so. We submit that this Court should make clear whether the Government refusing to proceed with the case on trial can prevent jeopardy from attaching. We submit an important question is raised as to whether the oath of the jury sworn to hear the evidence in a criminal cause is to be distinguished from the basic oath of a trial judge ready to hear evidence in the cause.

CONCLUSION.

Wherefore, for the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfuly submitted,

ANNA R. LAVIN,
Attorney for the Petitioner

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

NOS. 14412 ORIGINAL, 14377

SEPTEMBER TERM, 1963—APRIL SESSION, 1964

No. 14412 ORIGINAL

UNITED STATES OF AMERICA,
Petitioner,

v.

THE HONORABLE MICHAEL L. IGOE, United States District Judge of the United States District Court for the Northern District of Illinois,
Respondent.

Petition for Writ of Mandamus.

No. 14377

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

ORLANDO P. COLAMATTEO,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

May 7, 1964

Before SCHNACKENBERG, KNOCH and KILEY, *Circuit Judges.*

KNOCH, *Circuit Judge.* This appeal and this petition for mandamus arise out of the following circumstances. Orlando P. Colamatteo was indicted on a charge of violating Title 26, U.S.C. § 7201, evasion of income tax. On appeal, this Court reversed dismissal of that indictment and remanded the cause to the District Court for trial. *U. S.* v. *Colamatteo,* 1963, 312 F. 2d 154.

The case was set for trial on June 17, 1963. The government indicated that it would not consent to defendant's waiver of trial by jury, and the District Judge set the case for trial on September 10, 1963. Numerous subpoenas previously issued were continued in force and effect. The case was held on the trial call on September 10 and 11, 1963, and was called for trial September 12, 1963.

The defendant, at that time, signed a waiver of his right to trial by jury. Although the government clearly indicated its refusal to consent to such waiver, the District Judge approved the waiver and set the cause for trial the same day at 2:00 P.M., at which time the government declined to proceed to trial with its witnesses unless a jury were empaneled. The District Court dismissed the cause "for want of prosecution."

It is clear that the cause was dismissed because the government withheld its consent to waiver of trial by jury.

The government appealed the District Court's decision, but has also prayed that, if appellate jurisdiction is wanting to review the dismissal of the case, this Court issue its writ of mandamus directing that the dismissal order of September 12, 1963, be vacated and this cause proceed to trial on the indictment.

Rule 23 of the Federal Rules of Criminal Procedure provides:

> (a) Trial by Jury. Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government.

The Rules, promulgated by the Supreme Court of the United States, have the force and effect of law and are binding on District Judges conducting criminal trials in the United States District Courts. *U. S.* v. *Hvass*, 1958, 355 U. S. 570, 575. This Court has authority to issue its writ to ensure the proper application of those rules and in aid of its appellate jurisdiction. *Howes Leather Co.* v. *LaBuy*, 7 Cir., 1955, 226 F. 2d 703, 708, afd. sub nom. *LaBuy* v. *Howes Leather Co.*, 352 U. S. 249 (1957); *U. S.* v. *Smith*, 331 U. S. 469, 477 (1947); *Ex Parte United States*, 287 U. S. 241, 246 (1932); *Los Angeles Brush Corp.* v. *James*, 272 U. S. 701, 707 (1927).

Rule 23 is clear and unambiguous. For defendant effectively to waive his Constitutional right to trial by jury, he must secure both the approval of the Court and the consent of the government. *Patton* v. *U. S.*, 281 U. S. 276, 312 (1930); *Dixon* v. *U. S.*, D. C. Cir., 1961, 292 F. 2d 768, 769.

Respondent argues that the reasoning in *Patton* demonstrates that the primary object of the Rule later promulgated to reflect existing practice, and based on *Patton*, as indicated by the revisor's notes, is to protect the defendant; that the defendant here, an educated man, who has made a reasoned and intelligent waiver, needs no protection. Thus respondent contends that the interpretation of the Rule here sought by the government would be inconsistent with *Patton* and would give the government a substantive right to trial by jury through a mere procedural rule. In effect, respondent is saying that the de-

fendant has an absolute right to waive trial by jury. The Constitutional right to trial by jury does not give rise to a correlative right to trial without jury. See *C. I. T. Corp.* v. *United States,* 9 Cir., 1945, 150 F. 2d 85, 92, where an equally well reasoned and intelligent waiver of trial by jury was sought by the defendant, and cases there cited.

It is also contended by respondent that grant of the government's prayer will expose the defendant, Orlando P. Colamatteo, to double jeopardy. We disagree. No jury had been empaneled, no evidence had been heard, the trial had not begun when the cause was dismissed. *Hunter* v. *Wade,* 10 Cir., 1948, 169 F. 2d 973, 975, afd. 336 U.S. 684.

Respondent also argues that delay in filing this petition for writ of mandamus should bar the relief sought under the doctrine of laches. We have considered the cases on which respondent relies: *U. S. ex rel. Arant* v. *Lane* (1919), 249 U. S. 367, 39 S. Ct. 293; *In re United Shoe Machinery Corp.*, 1 Cir., 1960, 276 F. 2d 77, and find both involve a much longer lapse of time than in the case before us, with no adequate justification for the delay in either instance.

Here notice of appeal was filed promptly and record of an appeal docketed in apt time. The petition for writ of mandamus was filed with the government's brief on appeal. As in *U. S.* v. *Lane,* 9 Cir., 1960, 284 F. 2d 935, 939:

> The government, being justifiably uncertain whether appeal or mandamus was the proper remedy, decided to follow both courses concurrently.

Defendant, Orlando P. Colamatteo, has filed a motion to dismiss the appeal as not within the bases for jurisdiction in this Court, set out in Title 18, U. S. C. § 3731:

> An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases, in the following instances:

> From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section.
>
> From a decision arresting a judgment of conviction except where a direct appeal to the Supreme Court of the United States is provided by this section.

The government contends that the District Court in effect did dismiss the indictment and did so by sustaining what amounted to a plea in abatement. Relying on *U. S. v. Brodson*, 7 Cir., 1956, 234 F. 2d 97, the government asserts that a plea in abatement may be reviewed in this Court.

It is true that in *Brodson*, this Court did hold that the particular plea which resulted in dismissal of the indictment was a plea in abatement, as distinguished from a plea in bar. It was concluded that direct appeal to the Supreme Court which would be required by a successful plea in bar, was not necessitated by a plea in abatement, and that this Court did have jurisdiction. Defendant invites our attention, however, to the fact that there was no motion to dismiss the appeal in *Brodson*.

On due reflection, we find ourselves unable to accept the line of reasoning on which the government's contention is based. The defendant's motion to dismiss the appeal will be allowed, and the appeal is hereby dismissed.

We respect to the issuance of a writ of mandamus, on the other hand, we have considered all arguments advanced in opposition to it and find them unconvincing. We believe that the writ must be granted here. The District Court is directed to reinstate this case and to set it for trial.

APPEAL DISMISSED

WRIT OF MANDAMUS ISSUED.

SCHNACKENBERG, *Circuit Judge*, concurring.

I concur in Judge Knoch's opinion.

In answer to a contention of defendant that neither by appeal or mandamus can the government secure a review by this court of the dismissal of the instant case for want of prosecution, I wish to add that this question is to be determined not by its form, but by its substance. *United States* v. *Thompson*, 251 U. S. 407, 412 (1920). The record before us shows clearly that the real and only ground for dismissal of the case for want of prosecution was the government's refusal to sign the jury waiver.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

In the

United States Court of Appeals

For the Seventh Circuit

Chicago, Ilinois, 60610

Thursday, May 7, 1964

Before

Hon. ELMER J. SCHNACKENBERG, *Circuit Judge*
Hon. WIN G. KNOCH, *Circuit Judge*
Hon. ROGER J. KILEY, *Circuit Judge*

UNITED STATES OF AMERICA, *Petitioner,*	
No. 14412 vs.	
THE HONORABLE MICHAEL L. IGOE, United States District Judge of The United States District Court for the Northern District of Illinois, *Respondent.*	Petition for Writ of Mandamus

This matter comes before the Court on the petition of United States of America for a writ of mandamus, the answer of respondent thereto, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that a writ of mandamus issued as prayed for in said petition, commanding and directing the District Court to reinstate Case No. 61-CR-251 entitled *United States of America, Plaintiff* v. *Orlando P. Colamatteo, defendant,* and to set said case for trial.